***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 76-1233

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

EDUARDO RUA AND HECTOR GARCIA

Defendants-Appellants.

Docket No. 76-1233

Rec'd
8/6

JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALLAN LASHLEY, ESQ.,
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EDUARDO RUA
16 Court Street
Brooklyn, New York 11201
(212) 875-1128

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FEDERAL DEFENDER SERVICES UNIT
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Foley Square
New York, New York 10007
(212) 732-2971

PAGINATION AS IN ORIGINAL COPY

PLAIN

JUDGE/MAGISTRATE Assigned: 0720 | 207 District | 1 Office | Disp/Sentence

MISDEMEANOR Mis

FELONY Fel

U.S. vs. 76 CR 172 -1

RUA, EDUARDO
(LAST, FIRST, MIDDLE)

Def. Num. 3 | 9

PLATT, E
76 | 172

U.S. TITLE/SECTION: 18-659, 371 * 2

OFFENSES CHARGED: Did conspire to theft of goods in i.c.c.

ORIGINAL COUNTS: 2

CLOSED

U.S. MAG. CASE #

Detained | Fugitive | Pres. R. | PSA

$

Conditions: 10% Deposit | Surety Bond | Collateral | 3rd Pty Cust | Other

Date

Bail Not Made

Status Changed (See Docket)

SUPERSEDING COUNTS

II. KEY DATES & INTERVALS

ARREST or: U.S. Custody Began | Summons Served | First Appearance

High Risk Date

INDICTMENT X: Information 3-9-76 | Indict Waived | In Charging District | Superseding Indictment

ARRAIGNMENT: 1st Plea

TRIAL: Trial Set For | Trial Date X 3/22/76 | Trial Began X 3/22/ | 3/25/76

SENTENCE: Disposition of Charges | Convicted | Acquitted | Dismissed | On All Charges | On Lesser Offense(s) | WOP | SP | On Government's Motion

| | | DATE | INITIAL NO. | MAGISTRATE | INITIAL NO. | OUTCOME |
|---|---|---|---|---|---|---|
| Search Warrant | Issued | | | INITIAL APPEARANCE DATE | | |
| | Return | | | PRELIMINARY EXAMINATION / REMOVAL HEARING | | HELD FOR GJ OF OTHER PROCEEDING IN THIS DISTRICT; DISMISSED; HELD FOR GJ OF OTHER PROCEEDING IN DISTRICT BELOW |
| Summons | Issued | | | WAIVED / NOT WAIVED / INTERVENING INDICTMENT | TRANSFERRED | |
| | Served | | | | | |
| Arrest Warrant Issued | | | | | | |
| COMPLAINT | | | | | | |
| OFFENSE (In Complaint) | | | | | | |

U.S. Attorney or Asst.: Gary Woodfield

ATTORNEYS: -Frank-Ortiz; Allan Lashley, 16 Court St., Bklyn, NY. 875-1128

Show last names and suffix nos. of other defendants on this indictment

GARCIA 2;

| DATE | PROCEEDINGS (CLERK'S COMMENT NO.) |
|---|---|
| 3-9-76 | Before MISHLER, CH J - Indictment filed |
| 3-19-76 | Before Platt, J - case called - deft & counsel present - hearing ordered and begun - contd to 3-22-76. (F.Ortiz, Esq) |
| 3-22-76 | Before PLATT, J - case called - hearing resumed - motion argued and denied - hearing held & concluded - Trial ordered and begun - Jurors selected & sworn - trial contd to 3-23-76. |
| 3-23-76 | Before PLATT, J - case called - trial resumed - Defts motion to dismiss is denied - Trial contd to 3-24-76. |
| 3/24/76 | Before PLATT,J.- Case called- deft and counsel present- deft's motion to reopen case-motion denied-jury retires to deliberate-order of sustenance signed- trial contd to 3/25/76 |
| 3/24/76 | By PLATT,J.- Order of sustenance filed |
| 3-25-76 | Before PLATT, J - case called - trial resumed - jury resumes deliberation - jury returns with a verdict of guilty on counts 1 and 2 - jury polled - jury discharged - Bail contd with the condition that the deft shall not leave the |

A-B

| | |
|---|---|
| | Eastern District of NY and the SD of NY - trial concluded - Appeals forms issued. |
| 3-25-76 | By PLATT, J - Order of sustenance filed. |
| 4-9-76 | 76 M 553 (CBE) inserted in CR file. |
| 3-20-76 | Stenographers transcript filed dated March 19, 1976 |
| 5-26-76 | By PLATT, J - Order filed substituting counsel Allen Lashley as counsel for the deft. |
| 5-28-76 | Before PLATT, J - case called - deft & counsel present. Deft sentenced on count 1 to imprisonment for 5 years pursuant to 18:4205(b)(2) and a fine of $2500; on count 2 the defendant is sentenced to imprisonment for 5 years under 18:4205(b)(2) and fine of $2500; total fine of $5,000. said sentence of imprisonment to run concurrently with the sentence imposed under count one. Execution of term of imprisonment stayed pending appeal. Execution of payment of fine stayed to July 31, 1976. |
| 5-28-76 | Judgment and commitment filed - certified copies to Marshal. |
| 6-2-76 | Notice of appeal filed. |
| 6-2-76 | Docket entries and duplicate of Notice mailed to the Court of appeals |
| 6-4-76 | Before PLATT, J - case called - defts motion to extend time to obtain bond pending appeal - granted on consent - extended to June 9, 1976. |
| 6/10/76 | Order received from court of appeal that record be filed on or before 7/6/76 |
| 7-1-76 | 4 transcripts filed (2 dated Mar. 22; one dated Mar. 23 and one dated Mar. 24, 1976) |

CRIMINAL DOCKET - U.S. District Court

JUDGE/MAGISTRATE Assigned: 0720

MISDEMEANOR Mis / FELONY Fel

207 (District) 1 (Office) Disp'/Sentence

U.S. vs. GARCIA, HECTOR (LAST, FIRST, MIDDLE)

-2 -2 -2

75-825 76 172 2

U.S. TITLE/SECTION: 18-659, 371 & 2

OFFENSES CHARGED: Did conspire to theft of goods in i.c.c

ORIGINAL COUNTS: 2

U.S. MAG. CASE NO.

BAIL / RELEASE

Denied / Set / Amt / Fugitive / Pers Recog / PSA / Conditions / Date / 10% Deposit / Surety Bond / Collateral / Bail Not Made / Status Changed (See Docket) / 3rd Pty Cust / Other

II. KEY DATES & INTERVALS

SUPERSEDING COUNTS

| ARREST or | INDICTMENT XX | ARRAIGNMENT | TRIAL | SENTENCE |
|---|---|---|---|---|
| U.S. Custody Began | High Risk Date | 2/10/76 | Trial Set For | Disposition of Charges: 5/21/76 |
| Summons Served | Information: 3-9-76 | 1st Plea | Trial Began: 3/22 | Convicted / On All Charges |
| First Appearance | Indict. Waived | Final Plea | Trial Ended | Acquitted / Dismissed / WOR / YP |
| In Charging District | Superseding / Indictment | | | J.C. Commitment Mitt. |

MAGISTRATE

| | | DATE | INITIAL NO | | INITIAL NO | OUTCOME |
|---|---|---|---|---|---|---|
| Search Warrant | Issued | | | INITIAL APPEARANCE DATE | | DISMISSED |
| | Return | | | PRELIMINARY EXAMINATION | Date Held / Waived | HELD FOR GJ OR OTHER PROC. / FORMAL IN THIS DISTRICT |
| Summons | Issued | | | REMOVAL HEARING | Held / Waived | HELD FOR GJ OR OTHER PROC. / FORMAL IN THIS DISTRICT |
| | Served | | | WAIVED | NOT WAIVED | |
| Arrest Warrant Issued | | | | INTERVENING INDICTMENT | | |
| COMPLAINT | | | | | | |
| OFFENSE (In Complaint) | | | | | | |

U.S. Attorney or Asst: Gary Woodfield

ATTORNEYS

RUA 1;

| DATE | DOCUMENT NO. |
|---|---|
| 3-9-76 | Before MISHLER, CH J - Indictment filed |
| 3-10-76 | Before PLATT, J - case called - deft & counsel E.Kelly of Legal Aid present - deft arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty - bail set at $10,000 P.R.B. adjd to 3-19-76 for status report. |
| 3/18/76 | Notice of motion to suppress filed ret. 3/22/76 |
| 3-19-76 | Before Platt, J - case called - deft & atty E.Kelly present - hearing ordered and begun - hearing contd to 3-22-76. |
| 3-22-76 | Before Platt, J - case called - hearing resumed - motion argued and denied - hearing held & concluded - trial ordered and begun - Jurors selected and sworn - trial contd to 3-23-76. |
| 3-23-76 | Before PLATT, J - case called - trial resumed - motion to dismiss the indictment is denied - motion for directed judgement of acquittal denied - trial contd to 3-24-76. |
| 3/24/- | Before PLATT, J.- Case called- deft and counsel present- trial resumed jury retires to deliberate- trial contd to 3/25/76 |

| DATE | PROCEEDINGS (Continued) PAGE TWO | EXCLUDABLE DELAY |
|---|---|---|
| 3/24/76 | By PLATT,J.- Order of sustenance filed | |
| 3-25-76 | Before PLATT, J case called - rial resumed - Jury resumes deliberations - jury returns with a verdict of guilty on counts 1 and 2 as to the deft - jury polled and discharged - Bail contd with the condition that the deft shall not leave the Eastern Dist. of NY or the SD of NY. Deft Garcias' limits are extended to his place of employment -trial concluded - sentence adjd without date - appeals forms issued. | |
| 4-9-76 | 76 M553 CBE inserted in CR file. | |
| 5-20-76 | Stenographers transcript filed dated Mar. 19, 1976 | |
| 5/21/76 | Before PLATT,J.- Case called- deft and counsel present-deft sentenced on counts 1 and 2 to imprisonment for a period of 2 years and deft shall become eligible for parole under T-18, U.S.C. Sec. 4205(b)(2) at such time as the Board of Parole may determine said sentences to run concurrently- bail contd pending appeal | |
| 5/21/76 | Judgment and Commitment filed- certified copies to Marshal | |
| 5/24/76 | Notice of appeal filed | |
| 5/24/76 | Docket entries and duplicate of notice of appeal mailed to court of appeals | |
| 6/10/76 | Order received from court of appeals that record be docketed on or before 7/6/76 | |
| 7-1-76 | 4 transcripts filed (2 dated 3-22-76; 1 dated Mar. 23 and one dated Mar. 24, 1976) | |

A TRUE COPY
ATTEST
DATE
BY
CLERK

CR. NUMBER

F. #761,321

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR 172

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

EDUARDO RUA and
HECTOR GARCIA,

Defendants.

~~SUPERSEDING~~ INDICTMENT

Cr. No. ~~75 CR 939(S)~~
(T. 18, U.S.C., §659, §371 and §2)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
MAR 9 - 1976
TIME A.M.
P.M.

- - - - - - - - - - - - - - - - - - X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 22nd day of March, 1974, within the Eastern District of New York, the defendant EDUARDO RUA and the defendant HECTOR GARCIA did wilfully and unlawfully receive and have in their possession approximately Seven Hundred and Four (704) cases of Majorska Vodka and Blansac Brandy, having a value in excess of One Hundred Dollars ($100), which goods had been stolen from a tractor trailer while moving as a part of and constituting an interstate shipment of freight from Clifton, New Jersey to Miami, Florida, the defendants EDUARDO RUA and HECTOR GARCIA, knowing the same to have been stolen. (Title 18, United States Code, Section 659 and Section 2).

COUNT TWO

On or about and between the 1st day of January 1974 and the 22nd day of March 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EDUARDO RUA and the defendant HECTOR GARCIA did knowingly, intentionally and wilfully combine, conspire, confederate and agree, together and with Hector Matias, named herein as a co-conspirator but not a

defendant, and with others, to commit an offense against the United States in violation of Title 18, United States Code, Section 659, to wit, to knowingly and wilfully receive and have in their possession approximately Seven Hundred and Four (704) cases of Majorska Vodka and Blansac Brandy, having a value in excess of One Hundred Dollars ($100), which goods had been stolen from a tractor trailer while moving as a part of and constituting an interstate shipment of freight from Clifton, New Jersey to Miami, Florida, the defendants EDUARDO RUA and HECTOR GARCIA then knowing the said goods to have been stolen.

In furtherance of the said unlawful conspiracy and to effect the objectives thereof, the defendants EDUARDO RUA and HECTOR GARCIA and the unindicted co-conspirator Hector Matias committed the following:

OVERT ACTS

1. In or about March 1974, the defendant EDUARDO RUA and the unindicted co-conspirator Hector Matias had a conversation concerning the storage of stolen liquor in the defendant EDUARDO RUA's warehouse located at 187 Kent Avenue, Brooklyn, New York.

2. On or about March 22, 1974, the defendant HECTOR GARCIA rented two (2) trucks from Four - G's Truck Renting Company, Inc., 395 Kent Avenue, Brooklyn, New York.

A TRUE BILL.

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

(Whereupon, the jury entered the courtroom at 12:10 p.m.)

THE COURT: Ladies and gentlemen, I am going to give you the instructions on the law in this case. It is my practice to read the instructions, which I realize makes it more difficult for you to follow, but on the other hand, it minimizes the risk of error, and I think that's very important.

If my voice starts to drop and you can't hear any portion of the instructions, let me know. I will try to keep it up. Try to pay attention and listen to them all, because all of the instructions count.

Now that you have heard the evidence and the argument, it becomes my duty to give the instructions of the Court as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought

to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instruction of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

You must not permit yourselves to be governed by sympathy, bias, prejudice or any other considerations not founded on evidence and these instructions on the law.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not guilty" pleas of the accused. You are to perform this duty without bias or prejudice as to any party. Again, the law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will

carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

I am not sending the exhibits which have been received in evidence with you as you retire in your deliberations. You are entitled, however, to see any or all of these exhibits as you consider your verdict. I suggest that you begin your deliberations and then, if it would be helpful to you, you may ask for any or all of the exhibits simply by sending a note to me through one of the Marshals who is stationed outside your jury room door.

An indictment is but a form or method of accusing a defendant of a crime. It is not evidence of any kind against the accused.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence -- such as the testimony of an eye-witness. The other is circumstantial evidence -- the proof of facts and circumstances which rationally imply the existence or non-existence of other facts because such other facts usually follow according to the common experience of mankind. Thus, a footprint of a man in the sand implied to Robinson Crusoe that

there was another man with him on the desert island, and indeed there was, the man Friday.

Thus, on the one hand, you may have direct evidence of the issue, and on the other hand, you may have the circumstantial evidence of the issue. The law does not hold that one type of evidence is necessarily of better quality than the other. The law requires only that the Government prove its case beyond a reasonable doubt, both on the direct and circumstantial evidence.

At times the jury might feel that circumstantial evidence is of better quality. At other times, they may feel direct evidence is of better quality. That judgment is left entirely to you.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt, from all the evidence in the case.

Now, the law presumes the defendants to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate" -- with no evidence against him. And the law permits nothing but legal evidence presented before the jury

to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt does not mean a doubt arbitrarily and capriciously asserted by a juror because of his or her reluctance to perform an unpleasant task. It does not mean a doubt arising from the natural sympathy which we all have for others. It is not necessary for the Government to prove the guilt of the defendant beyond all possible doubt. Because if that were the rule, very few people would ever be convicted. It is practically impossible for a person to be absolutely sure and convinced of any controverted fact which, by its nature, is not susceptible of mathematical certainty.

In consequence, the law says that a doubt should

be a reasonable doubt, not a possible doubt.

A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person to hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

Again, a reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a prudent person to hesitate to act in the most important affairs of his or her life.

The requirement of proof beyond a reasonable doubt operates on the whole case and not on the separate bits of evidence. Each individual item of evidence need not be proven beyond a reasonable doubt.

It is charged in Count One of the indictment: That on or about the 22nd day of March, 1974, within the Eastern District of New York, the defendant Eduardo Rua, and the defendant Hector Garcia, did wilfully and unlawfully receive and have in their possession

approximately 764 cases of Majorska vodka, Brandsac Brandy, having a value in excess of a hundred dollars, which goods have been stolen from a tractor-trailer while moving in interstate shipment of freight from Clifton, New Jersey to Miami, Florida.

The defendant Eduardo Pua and Hector Garcia knowing the same to have been stolen; all in violation of Title 18, United States Code, Section 659 and Title 18, United States Code, Section 2.

Now, Section 659 of Title 18 of the United States Code alleged to have been violated reads in pertinent part as follows:

"Whoever embezzles, steals, or unlawfully takes, carries away from any motor truck or other vehicle with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen"

Shall be guilty of an offense against the laws of the United States.

Section 2 of Title 18 of the United States Code

which section is also cited in Count One says:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The essential elements of the crime charged which must be proved beyond a reasonable doubt are as follows:

One, that the accused had the goods or merchandise in his or their possession, as the case may be;

Two, that such goods or merchandise exceeded in value of $100;

Three, that such possession was done knowingly and intentionally;

Four, that such goods or merchandise had been stolen or unlawfully taken or carried away from a motor truck or other vehicle while the goods or merchandise was moving as a part of or constituted an interstate shipment of freight, express or other property; and,

Paragraph five, that the accused knew such goods or merchandise had been stolen.

It is not necessary that the accused knew that the goods or merchandise had been stolen from a motor truck or other vehicle while the goods or merchandise were moving as part of a foreign shipment. It is necessary only that the proof showed that the accused knew that the goods or merchandise had been stolen.

Now, with respect to both counts of the indictment, the term "interstate shipment of freight or express," includes a shipment in interstate commerce.

Section 10 of Title 18 of the United States Code provides that:

"The term interstate commerce includes" commerce between one state and another state.

The interstate character of the property stolen is an essential element of this offense. The property must either be moving in or be a part of an interstate shipment at the time of the theft.

The interstate character of the shipment commences when the property is segregated for interstate shipment and comes into possession of those who are affecting its course in interstate commerce and continues until the property arrives at its destination and is there delivered.

fols.

THE COURT: (continuing) Section 659 of Title 18 of the United States Code further provides that:

"To establish the interstate commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such a shipment was made."

"Prima facie evidence" means sufficient evidence, unless outweighed by other evidence in the case. In other words, waybills or bills of lading or other shipping documents such as invoices, if proved, are sufficient to show the interstate commerce character of the shipment in the absence of evidence in the case which leads the jury to a different or contrary conclusion.

Again, the evidence in the case need not establish that the accused actually knew the goods or merchandise mentioned in the indictment constituted a part of an interstate shipment.

The word "Unlawfully" means contrary to law. So todo an act unlawfully means to do wilfully something which is contrary to law.

The word "stolen" as used in the crime of interstate transportation of stolen goods includes all

wrongful and dishonest takings of property with the intent to deprive the owner of the rights and benefits of ownership.

Otherwise stated, the word "steal" is used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership but may or may not involve the element of stealth. To steal means to take away from one in lawful possession without right to keep it wrongfully.

The Government must establish the value of the property stolen because the law provides a greater penalty if the value of the property exceeds $100. Value under the statute means face, par or market value or cost price, either wholesale or retail, whichever is greater. The value of the property stolen is a question of fact to be determined by the jury.

Proof as to the value of the goods in this case may be found in the invoices received in evidence. You are instructed that the defendants' knowledge or belief with respect to the value of the goods is wholly irrelevant.

In order to authorize the greater penalty, the Government must establish beyond a reasonable doubt

that value of the goods or merchandise exceeded $100.

Now, with respect to the question of possession; the law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one personal loan has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances, shown by the evidence in the case, that the person in possession knew the property had been stolen.

Ordinarily, the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer theperiod of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you find beyond a reasonable doubt from the evidence in the case that the goods or merchandise described in Count 1 of the indictment were stolen, and that, while recently stolen, the goods or merchandise were in the possession of the accused with knowledge that the goods or merchandise were stolen, unless possession of the recently stolen goods or merchandise by the accused is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.

It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently

stolen property. If any possession the accused may have had of recently-stolen property is equally consistent with innocence or if you entertain reasonable doubt of guilt, you must acquit the accused.

One of the elements of the crime charged in each count of the indictment is that the accused knew the merchandise they possessed was unlawfully stolen, and, as I have already instructed you, that must be proven beyond a reasonable doubt.

Knowledge is something that you cannot see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence.

The Government relies largely upon circumstantial evidence in this case to establish knowledge.

In deciding whether the accused knew the merchandise was stolen, you must consider all the circumstances such as how the accused handled the transaction, how he or they conducted himself or themselves. Do his or their actions betray guilty knowledge that he or they were dealing with stolen merchandise or are his or their actions those of an innocent man or men.

Guilty knowledge cannot be established by demonstrating more negligence or even foolishness on the part

of the accused.

Knowledge that the goods may be stolen may be inferred from the circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that an accused deliberately closed his eyes to what otherwise would have been obvious to him.

Thus, if you find that the accused acted with reckless disregard or whether the merchandise was stolen, and with a conscious purpose to avoid learning the truth, the requirements of knowledge would be satisfied unless the accused actually believed they were not stolen.

In this connection you should scrutinize the entire conduct of the accused at or near the time the offenses were alleged to have been committed.

I have read to you a moment ago Section 2 of Title 18, the so-called aiding and abetting section. I will read it to you and give you some further instructions with regard to it.

Section 2 of Title 18 of the United States Code provides that:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or

procures its commission, is punishable as a principal."

"Whoever wilfully causss an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

In other words, every person who wilfully participates in the commission of a crime may be found guilty of that offense. Participation is willful if done voluntarily and intentionally, and with a specific intent to do something the law forbids or with a specific intent to fail to do something the law requires to be done; that is to say, with bad purpose to either disobey or to disregard the law.

In order to aid and abet another to commit a crime it is necessary that the accused wilfully associate himself in some way with the criminal venture, and wilfully participate in it as he would in something he wishes to bring about; that is to say, that he wilfully seeks, by some act or omission of his to make the criminal venture succeed.

An act or omission is "wilfully" done if done

voluntary and intentionally and with the specific intent to do something the law forbids,or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose to either disobey or to disregard the law.

You, of course, may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the defense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

Now I have charged you with respect to the law as to actual and constructive possession either alone or jointly with others and the law with respect to possession of property recently stolen and the inference you may but are not required to draw therefrom that the person in possession knew the property had been stolen, and also with respect to the hw as to aiding and abetting in the commission of crime. Bear in mind

that if you find that one of the defendants had actual or constructive possession of recently stolen property, you may, but are not required, to draw the inference that he knew the property had been stolen. But, at the same time, if you do not so find that the other defendant had actual or constructive possession jointly with the first defendant or solely by himself but merely find that he aided and abetted the first defendant, then you may not infer that such an aider and abettor of the person in possession of recently stolen property knew the property had been stolen.

In other words, to draw such an inference you must first find that the particular defendant had actual or constructive possession either alone or jointly with another of recently stolen property. You may not draw such an inference with respect to one who is merely an aider and abettor of one who had such actual or constructive possession.

(Continued on next page)

THE COURT: (Continuing) Going on to count 2 of the indictment, which is the conspiracy count, it is charged in count 2 of the indictment that:

On or about and between the 1st day of January, 1974 and the 22nd day of March, 1974, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant, Eduardo Rua, and the defendant Hector Garcia, did knowingly, intentionally and willfully combine, conspire, confederate and agree, together and with Hector Matias, named herein as a co-conspirator but not as a defendant, and with others to commit an offense against the United States in violation of Title 18, United States Code Section 659, to wit, to knowingly and willfully receive and have in their possession approximately seven hundred four (704) cases of Majorska Vodka and Bransac Brandy, having a value in excess of one hundred dollars $100), which goods had been stolen from a tractor-trailer while moving as a part of and constituting an interstate shipment of freight from Clifton, New Jersey to Miami, Florida, the defendants Eduardo Rua and Hector Garcia then knowing the said goods to have been stolen.

In furtherance of the said unlawful conspiracy

and to affect the objectives thereof, the defendants Eduardo Rua and Hector Garcia and the unindicted co-conspirator Hector Matias committed the following overt acts:

In or about March 1974, the defendant Eduardo Rua and the unindicted co-conspirator, Hector Matias, had a conversation concerning the storage of stolen liquor in the defendant's, Eduardo Rua's warehouse located at 187 Kent Avenue, Brooklyn, New York.

Two, on or about March 22, 1974, the defendant Hector Garcia rented two (2) trucks from 4-G's truck-renting company, 395 Kent Avenue, Brooklyn, New York.

Section 371 of Title 18 of the United States Code provides in pertinent part that:

"If two or more persons conspire to commit any offense against the United States and one or more of such persons do an act to effect the object of the conspiracy, each" -- is guilty of an offense against the United States.

The following are the essential elements which are required to be proven beyond a reasonable doubt in order to establish the offense of conspiracy in the indictment:

One, that there was an agreement or conspiracy

between two or more persons to violate the law as charged in the indictment;

Two, that the conspiracy described in the indictment was willfully formed and existed at or about the time alleged;

Three, that the conspiracy was so willfully formed and existing for the purpose of knowingly and willfully receiving and having in the possession of the accused goods or merchandise unlawfully taken from a motor truck or other vehicle which goods or merchandise had been moving as a part of or which constituted an interstate shipment of property and had a value in excess of $100; the accused knowing the same to have been stolen;

Four, that the accused willfully became a member of the conspiracy;

Five, that one of the conspirators thereafter knowingly committed one of the overt acts charged in the indictment at or about the time and place alleged;

Six, that such overt act was knowingly done in furtherance of the object of the conspiracy as charged; and

Seven, that the accused was knowingly and

willfully a member of the conspiracy with the intent to further one of its objectives.

If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proven, and that during the existence of the conspiracy, one of the overt acts alleged was knowingly done by one or more of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete, and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed.

Now, a conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose. So, a conspiracy is a kind of "partnership in criminal purposes," in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily

establish proof of the existence of a conspiracy. Mere association may not in and of itself be the basis of an inference of guilt of conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such.

What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy

was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

In your consideration of the evidence in the case as to the offense of conspiracy charge, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not each of the accused willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that a defendant unlawfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators committed one or more overt acts in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have

succeeded in accomplishing their common object or purpose and in fact may have failed in so doing.

The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in the conspiracy.

An "overt act" is an act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or schema. It must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

It is not necessary that all of the overt acts charged in the indictment were performed. One overt act is sufficient.

One may become a member of the conspiracy without full knowledge of all the details of the conspiracy.

On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before the jury may find either or both of the defendants or any other person has become a member of the conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that said defendants or other person who was claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily or intentionally and with specific intent to do something the law forbids, that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So if a defendant or any other person, with understanding of the unlawful character of the plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant.

(continued next page)

THE COURT: (continuing) One who wilfully joins in an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and the declarations of all the alleged participants. However, in determining whether a particular defendant is a member of a conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statements thereafter knowingly made and the acts knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to be a member, even though the statements and acts made may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuancy of such

conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incrimination statement made or act done outside of Court, by one person, may not be considered as evidence only against the person making it.

The indictment charges a conspiracy among the two defendants, Hector Garcia and Eduardo Rua and Hector Matias, all of whom along with others known and unknown to the Grand Jury. A person cannot conspire with himself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he participated in the conspiracy as charged with at least one other person. With this qualification you may find all of the defendants guilty or both of them guilty or both of them guilty or both of them not guilty, all in accordance with these instructions and the facts you find.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent

reason.

As stated before, with respect to the offense such as charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction.

An act is done "wilfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

Knowledge and intent ordinarily may not be proved directly, because there's no way of fathoming or scrutinizing the operations of the human mind. But, you may infer a defendant's knowledge and intent from the surrounding circumstances. You may consider any statement made and done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Now, there has been evidence from which the Government requests thatyou draw an inference, and that was a flight on the part of the defendant, Rua. With respect to that, flight of an accused after a

crime has been committed does not create a presumption of guilt. It is, however, a circumstance which may tend to prove the consciousness of guilt and should be considered and weighed by the jury in connection with all the other evidence. The weight to be given evidence of flight depends on the motives which prompted it and all of the surrounding facts and circumstances.

Statements and arguments of counsel are not evidence in the case, unless there is an admission or stipulation of fact. And when the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, you may accept the Court's declaration as evidence, and regard as proved the fact or event which has been judicially noted, but you are not required to do so since you are the sole judge of the facts.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of

who may have produced them, and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Evidence does not include, however, what is brought out from witnesses on cross-examination, as well as what is testified to on direct examination.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

You are to consider only the evidence in the case and your verdict is to be based on the evidence only. But, in your consideration of the evidence you are limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in

the case.

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyers' statements are not evidence.

Evidence relating to any statement or act or omission claimed to have been made or done by a defendant outside of Court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether anystatement or act or omission claimed to have been made by a defendant outside of Court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation and physical and mental condition of the defendant, and

his treatment while in custody or while under investigation, as shown by the evidence in the case; and also all of the circumstances in evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done, the defendant knew or had been told and understood that he was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make or do could be used against him in Court; that he was entitled to the assistance of counsel before making any statement, either oral or in writing, or before doing any act or omission.

If the evidence in the case does not convince you beyond a reasonable doubt that a statement was made voluntarily and intentionally, you should disregard it entirely.

On the other hand, if the evidence in the case does show beyond a reasonable doubt that the statement was, in fact, voluntarily and intentionally made, you may consider it against the defendant who voluntarily made the statement.

The rules of evidence ordinarily do not permit

witnesses to testify as to opinions or conclusions. An exception to the rule exists as to those whom we call "expert witnesses." Or in certain instances, and I believe in this case I made an exception in the case of the FBI agent who might not have deemed strictly an expert witness in a technical sense, he gave his opinion with respect to a field which he claimed to be well versed and trained.

Witnesses who, by education and experience, have become expert in some art, science, profession or calling, may state their opinions as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

(Continued on next page)

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters.

Consider also any relation each witness may bear to each side of the case; the manner in which each witness must be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the

effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood. You will give such credibility, if any, as you think it deserves.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

The law permits a defendant, at his own request, to testify on his own behalf. The testimony of both defendants is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his or their testimony.

Now, there has been testimony here to the previous good character of the defendant Rua. You should consider such evidence of character together with all the other facts with respect to the guilt or innocence of said defendant. Evidence of good character may in itself create such a reasonable doubt where without such evidence no reasonable doubt would have existed. But, if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character does not justify or excuse the offense,

and you should not acquit a defendant merely because you believe he is a person of good repute.

The testimony of a character witness is not to be regarded by you as expressing the witness' personal opinion as to the guilt or innocence of the defendant. The guilt or innocence of the defendant is for you, and you alone, to determine.

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness

would have said if he had been permitted to answer any question.

The fact that the Court has asked one or more questions of a witness for clarification or admissibility of evidence purposes is not to be taken by you in any way as indicating that the Court has any opinion as to the guilt or innocence of the defendant in this case, and you are to draw no such inference therefrom. That determination is up to you and you alone, based on all the facts in this case and the applicable law in these instructions.

Now, you are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are guilty. But, if any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused not guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict,

it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so, without violence to individual judgment. Each of you must decide the case for himself and herself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them.

You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclination of human beings.

If the accused be proved guilty beyond a reasonable doubt, so say. If not so proved guilty, say so.

You must render a verdict with respect to each of the defendants on each of the two separate counts. In other words, you must render a separate verdict with respect to each defendant on each of the two separate counts in the indictment.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, the lady seated closest to me, Juror No. 1, will act as your Forelady, unless she chooses not to do so. If she chooses not to do so, you will elect a Forelady or Foreman, and will be your spokesman here in court.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by one of the Deputy Marshals signed by your Forelady or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally, here in open court.

You will note from the oath about to be taken by the Marshals that they, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Now, bear in mind also that you are never to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise on the question of the guilt or innocence of the accused, until

after you have reached a unanimous verdict.

In other words, you are not to send me a note at some point in the afternoon saying that we stand thus and so or thus and so on this defendant, and thus and so on the other defendant. If you do, the chances are that the Court will have to declare a mistrial, and it is time-consuming and expensive. We don't want to do that unless it's absolutely necessary.

When, as and if you reach a verdict, you write on the slip of paper, "We have reached a verdict." You don't tell me or the Marshal or anyone else what that verdict is. You announce the verdict here in open court.

I hope this does not occur, but if the occasion should arise when you feel you are hopelessly deadlocked, you may write me a note indicating as such.

Those are the instructions of the Court on the law. I am going to ask you to retire briefly for about five minutes while I discuss certain questions with the attorneys, and then come back in here; at which point the alternates will be discharged, and you may begin your deliberations.

But, during that five-minute recess, don't discuss the case.

Mrs. Baum, I notice you were taking notes during the course of your instructions. Since you are required not to single out one instruction as a whole, I am afraid I am going to have to take those notes from you and mark them as a Court exhibit, and not let you use it.

Similarly, I didn't notice if you took any notes during the course of any of the testimony, I don't know whether you did.

MRS. BAUM: --

THE COURT: Don't tell me what you took.

Just as you go out, hand it to one of the Marshal's, please.

All right. You may retire and I will call you back in a few minutes. Don't discuss the case.

(Whereupon, the jury left the courtroom at one o'clock.)

(Continued on next page.)

THE CLERK: One envelope marked for identification as Court's Exhibit 1.

MR. WOODFIELD: Your Honor, I have no objection to the charge.

MR. KELLY: I have no objection on behalf of the defendant Garcia.

MR. ORTIZ: No objection.

THE COURT: Let's get them back.

I just don't think it's right. I hope you all agree with me that --

MR. WOODFIELD: With regard to evidence, I might disagree with you with regard to the charge. I don't think so.

(Whereupon, the jury entered the courtroom at 1:05 p.m.)

THE COURT: Perhaps I should add I don't say any of this by way of criticism, Mrs. Baum. I appreciate her attentiveness and her anxiousness to get as many of the instructions correct in her mind as possible. If at any time you wish any portion or all of the instructions re-read during the course of your deliberations, I will be glad to do so. At least feel free to do that, if you wish.

Alternate jurors, your time has come. I don't

know if you ordered lunch or not, but if you did y[illegible] should pick up your belongings from the jury room and then go out of that door, across the hall, and you can go to the witness room across the hall and have your lunch.

Take your cards down to the Central Jury Part and then check out.

I don't know whether they have any more jury service for you or not. They will tell you downstairs. You go with the thanks of the Court for the service on your part and for your attentiveness.

Unfortunately, you are not entitled to sit with the other twelve jurors during their deliberations, so you may go. You two gentlemen at the end of the row, you may go and pick up your clothing from the jury room.

(Whereupon, the marshals were sworn.)

(Whereupon, the alternates left the courtroom.)

THE COURT: All right. Now, ladies and gentlemen, I suspect that if it hasn't arrived, your lunch is going to arrive very shortly. So what I am going to do is let the attorneys go to lunch between now and 2:15. So if you finish your lunch before then or if you have any questions before then, I should say you may begin your deliberations at any time as soon

as you get the marshal out of the room, and you may deliberate during lunch if you choose, but if you have any questions or if you have any notes, hold those notesuntil 2:15.

All right. Now you may discuss the case.

(Whereupon, the jury left the courtroom at 1:10 p.m.)

MR. ORTIZ: Judge, would it be possible for me to come back at 2:30, and if anything comes up --

THE COURT: You want to leave it in the hands of Mr. Kelly? There probably won't be anything but exhibits, anyway.

(Whereupon, Court was recessed at 1:15 p.m.)

* * *

(Time noted: 3:35 p.m.)

THE COURT: I have a note, gentlemen. They asked me to give them the charge on possessio specifically the part on the knowledge or suspicion that something was stolen.

MR. ORTIZ: I didn't hear that, Judge. I'm sorry.

THE COURT: "We would like to hear the charge to the jury on possession, specifically the part on the knowledge or suspicion something was stolen."

That, I would take it, would start with respect to the question of possession, the law recognizes two kinds of possession, possession of stolen property, if not satisfactorily explained, and then one of the elements -- knowledge, is something you cannot see with the eye or touch with the fingers, what I would read to them.

MR. KELLY: All right.

MR. WOODFIELD: Appears to be they are concerned with the recent possession or charge, the inference to be drawn.

THE COURT: I can't see the harm of reading the entire part. They can discard what they don't want.

Let's mark it as Court Exhibit No. 3.

THE CLERK: Jurors' note received as Court's Exhibit 3.

(So marked)

THE COURT: Bring them in, please.

(The jury enters the jury box.)

THE COURT: Ladies and gentlemen, I have your note, and I will re-read to you the portions pertaining to possession that you want. If you want more read, let me know after I've read it.

With respect to the question of possession, the law recognizes two kinds of possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion over or control over a thing, either directly or through another person or persons then in constructive possession of it. The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing possession is joint.

Possession of property recently stolen --

JUROR NO. 4: I can't hear you. That's why I raised my hand.

THE COURT: I'm sorry. I'll try to raise my voice.

With respect to the question of possession, the law recognizes two kinds of possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons is then in constructive possession.

The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Possession of property recently stolen, if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen.

Ordinarily the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property.

The term "recently," is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may be reasonably drawn from unexplained possession.

If you find beyond a reasonable doubt from the evidence in the case that the goods or merchandise described in Count 1 of the indictment were stolen, and that while recently stolen the goods or merchandise were in the possession of the accused, you may from those facts draw the inference the goods or merchandise were possessed by the accused with knowledge that the goods or merchandise were stolen unless possession of the recently stolen goods or merchandise by the accused is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.

It is the exclusive province of the jury to determine whether the facts and circumstances shown

by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property.

If any possession the accused may have had of recently stolen property is equally consistent with innocence or if you entertain reasonable doubt of guilt, you must acquit the accused.

One of the elements of the crime charged in the first count of the indictment is that the accused knew that the merchandise he or they possessed was unlawfully stolen. As I have already instructed you, that must be proven beyond a reasonable doubt.

Knowledge is something that you cannot see with the eye or touch with the fingers. It is seldom possible to prove it by direct evidence. The Government relies largely upon circumstantial evidence in this case to establish knowledge.

In deciding whether the accused knew the merchandise was unlawfully stolen, you should consider all the circumstances, such as how the accused handled the transaction, how he or they conducted himself or themselves; do his or their actions portray their guilty knowledge that he or they were dealing with stolen merchandise or his his or their actions

those of an innocent man or men?

Guilty knowledge cannot be established by demonstrating merely negligence or foolishness on the part of the accused. Knowledge the goods may be stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is a fact. The element of knowledge may be satisfied by proof that an accused closed his eyes or their eyes to what otherwise would have been obvious to him or them. Thus, if you find that an accused acted with reckless disregard as to whether the merchandise was stolen and with a conscious purpose to avoid learning the truth, the requirements of knowledge would be satisfied unless the accused actually believed they were not stolen.

In this connection you should scrutinize the entire conduct of the accused at or near the time the offenses were alleged to have been committed.

Those are the instructions.

(The jury leaves the courtroom.)

MR. KELLY: Thank you, Judge.

MR. WOODFIELD: Thank you.

(Time noted: 3:43 p.m.)

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(Time noted: 4:35 p.m.)

(The jury entered the jury box.)

THE COURT: Step up.

(Side bar)

THE COURT: I'll read the indictment first and then the instructions.

MR. KELLY: All right, Judge.

(In open court)

THE CLERK: Jurors' note received as Court's Exhibit 4.)

(So marked)

THE COURT: You asked for the Judge's instructions regarding conspiracy. Then you say "What is the legal definition of conspiracy. We also want to hear the indictment regarding conspiracy charge."

I'll read to you the indictment. Then I could read to you the statute and the essential elements and all of the instructions I can read to you.

The definition on conspiracy. Do you want it all read, or just a portion read of that? I'd better read it all.

JUROR NO. 7: Better read it all.

THE COURT: Count 2 of the indictment reads as follows:

"On or about and between the 1st day of January 1974 and the 22nd day of March 1974, both

dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Eduardo Rua and the defendant Hector Garcia did knowingly, intentionally and willfully combine, conspire, confederate and agree, together with Hector Matias, named herein as a co-conspirator but not as a defendant, and with others, to commit an offense against the United States in violation of Title 18, United States Code, Section 659, to wit, to knowingly and willfully receive and have in their possession approximately seven hundred and four cases of vodka and brandy, having a value in excess of one hundred dollars, which goods had been stolen from a tractor-trailer while moving as a part of and constituting an interstate shipment of freight from Clifton, New Jersey, to Miami, Florida, the defendants Eduardo Rua and Hector Garcia then knowing the said goods to have been stolen.

"In furtherance of the said unlawful conspiracy and to effect the objectives thereof, the defendants Eduardo Rua and Hector Garcia and the unindicted co-conspirator Hector Matias committed the following overt acts.

"1. In or about March 1974 the defendant Eduardo Rua and the unindicted co-conspirator Hector

Matias had a conversation concerning the storage of stolen liquor in the defendant Eduardo Rua's warehouse located at 187 Kent Avenue, Brooklyn, New York.

"2. On or about March 22, 1974, the defendant Hector Garcia rented two trucks from Four G's Truck Renting Company, Inc., 395 Kent Avenue, Brooklyn, New York."

If you wish and ask for it, I will send that indictment in its entirety in with you. You're entitled if you wish. You asked it be read.

Section 371 of Title 18, United States Code, provides in pertinent part, "If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States."

The following are the essential elements which are required to be proven beyond a reasonable doubt in order to establish the offense of conspiracy in the indictment.

1. That there was an agreement or conspiracy between two or more persons to violate the law as charged in the indictment.

2. That the conspiracy described in the indictment was willfully performed and existed at

or about the time alleged.

3. That the conspiracy was so willfully formed and existing for the purpose of knowingly and willfully receiving and having in the possession of the accused goods or merchandise unlawfully taken from a motor truck or other vehicle which goods or merchandise had been moving as a part of or which constituted interstate shipment of property and had a value in excess of $100, the accused knowing the same to have been stolen.

4. That the accused willfully became a member of the conspiracy.

5. That one of the conspirators thereafter knowingly committed one of the overt acts charged in the indictment at or about the time and place alleged.

6. That such overt act was knowingly done in furtherance of the object of the conspiracy as charged, and

7. That the accused was knowingly and willfully a member of the conspiracy with the intent to further one of its objectives.

If the jury should find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy charged in the indictment has been proved and that during the existence of the conspiracy

one of the overt acts alleged was knowingly done by one or more of the conspirators in furtherance of some object or furtherance of the conspiracy, then proof of the conspiracy as charged is complete and it's complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed.

What is a conspiracy? A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose. So a conspiracy is a kind of partnership in criminal purpose in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey or to disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together, discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. Mere association may not in and of itself be the basis for an inference of guilt of conspiracy.

However, the evidence in the case need not show that the members entered into any express or

formal agreement or that they directly by words spoken or in writing stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy nor that all means or methods which were agreed upon were actually used or put into operation, nor that all of the persons charged to have been members of the alleged conspiracy were such.

What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the indictment, and that two or more

persons including one or more of the accused, were knowingly members of the conspiracy as charged in the indictment.

In your consideration of the evidence in the case as to the offense of the conspiracy charge, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude the conspiracy did exist, you should next determine whether or not each of the accused willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that the defendant lawfully became a member of the conspiracy either at its inception or afterwards, and that thereafter the one or more of the conspirators committed one or more overt acts in furtherance of the object or purpose of the conspiracy, then there may be a conviction, even though the conspirators may not have succeeded in accomplishing their common object or purpose, in fact may have failed in so doing.

The extent of any defendant's participation moreover is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he played only a minor part in the con-

spiracy.

An overt act is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. May be as innocent as a mar the act of a man walking across the street or driving an automobile or using a telephone. It must, however, be an act which follows and tends towards accomplishment of the plan or scheme. It must have been knowingly done in furtherance of some objec or furtherance of the conspiracy charged in the indictment. It is not necessary that all of the overt acts charged in the indictment were performed, one overt act is sufficient.

One may become a member of the conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before the jury may find either or both of the defendants or any other person has become a member of the conspiracy, the evidence in the case

must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the particular defendand or other person who has been claimed to have been a member willfully participated in the unlawful plan or intent to advance some further object of the conspiracy.

To act or participate willfully means to act or participate voluntarily or intentionally and with a specific intent to do something the law forbids, that is to say, to act or participate with a bad purpose, either to disobey or disregard the law. So if a defendant or any other person with the understanding of the unlawful character of the plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a willful partipant, i.e., a conspirator.

One who willfully joins in an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the acts and declarations of all the alleged participants. However, in determining whether a particular defendant was a member of a conspiracy, if any, the jury should consider only

his acts and statements. He cannot be bound by the act or declaration of other participants until it is established the conspiracy existed and he is one of its members. Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts knowingly done by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member of it, even though the statements and acts made may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy; otherwise any admission or incriminatory statement made or act done outside of court by one person may not be considered as evidence against any other person who was not present and did not hear the statement made or see the act done. Therefore statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making it.

The indictment charges a conspiracy among the two defendants, Mr. Hector Matias, and with others, all of whom are named in the indictment as co-conspirators.

A person cannot co-conspire with himself; therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he participated in the conspiracy as charged with at least one other person.

With this qualification you may find either-- I'm sorry -- both the defendants guilty or one of the defendants guilty and one not guilty or both not guilty -- all in accordance with these instructions and the facts which you find.

(The jury leaves the courtroom.)

THE COURT: Gentlemen, I have a pretrial meeting going in my chambers and I'll probably go to at least 5:30 or so. About that time it would be my thought to call in the jury, if they are not close to a verdict, to let them go until tomorrow morning unless you all have different thoughts.

MR. KELLY: That's agreeable to me if they haven't reached a verdict at 5:30.

THE COURT: It depends a little bit how long this meeting goes. I think probably by six o'clock

I'm going to let them go anyway. I don't like to keep them here.

MR. KELLY: Fine.

THE COURT: Unless you have some objection?

MR. ORTIZ: No objection.

THE COURT: Mr. Woodfield?

MR. WOODFIELD: No objection, your Honor.

THE COURT: Very well.

(Time noted: 4:50 p.m.)

(Time noted: 4:51 p.m.)

PA fols

THE COURT: They now wish the indictment.

THE CLERK: Jurors' note Court Exhibit 5.

(So marked)

THE COURT: Is that all right?

MR. WOODFIELD: No objection.

MR. KELLY: No objection.

MR. ORTIZ: No objection.

(Time noted: 4:52 p.m.)

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Q Now, directing your attention to the period of time when you did commence your surveillance at that location, what were your objectives?

A After I got there, nothing happened until about 4:00 p.m. that day when a straight job, straight truck, with Four G's Rental emblem on it, approached the door, driver got out, opened the roll-top door at 187 Kent Avenue, and another individual in the cab of the truck backed the truck into that location. These were two Hispanic persons, males.

THE COURT: Wait a minute, Mr. Woodfield. I think the record should show that Mr. Ortiz came in, according to my note, just at the point where Mr. Teel was describing in the nose of the trailer there are a number of cases of Vodka found, and he has been here since that time. I want the record to be clear that he did show during the course of the hearing. Go ahead.

Q Agent Teel, was the roll-top door to this warehouse closed after the truck entered?

A As soon as the truck entered the roll-top door was closed.

Q Was there any observation by you and your fellow agents outside as to the activities inside?

A We had no way of looking in the warehouse from our position.

THE COURT: You say, 4:00 p.m., a straight job went into the warehouse?

THE WITNESS: Backed in.

THE COURT: And then the garage doors closed?

THE WITNESS: Closed.

MR. WOODFIELD: May I have this marked for exhibit?

THE CLERK: One photograph marked for identification. This is Government's Exhibit 1.

(So marked.)

BY MR. WOODFIELD:

Q Agent Teel, I show you what has been marked as Government's Exhibit 1 for identification, and ask you if you can identify that exhibit?

A This is a photograph of the warehouse we were observing on 187 Kent Avenue. The photograph is taken from Kent Avenue and to the left side of the photograph is the roll-top doorway referred to at 187 Kent Avenue.

Q And from looking at that photograph, can you

observe any windows at all in that warehouse?

A I see no windows.

Q And, in fact, while you were on surveillance was there any occasion where you were able to see inside that warehouse?

A No, there was not.

Q You testified that you observed the truck enter the warehouse approximately 4:00 o'clock that afternoon. What, if any, were the further observations of activities that you observed with regard to that truck?

A Nothing else happened until approximately 5:02 when the roll-top doors went up. The truck pulled out of the doorway, stopping on the sidewalk entering the street. The driver of the truck exited the cab of the truck and started to close the roll-top door.

Q Where were you located at this time?

A I was located on the sidewalk, on the driver's side of the cab.

Q And were you standing there, or moving?

A I was walking toward it.

Q And how far would you say you were away from the cab of the truck?

A I'd estimate 20 feet.

Q Now, what, if anything, were your observations

at that time?

A As I got within maybe 15 to 10 feet of the cab of the truck, I could clearly observe the open door, a case of Blansac Brandy on the front seat where the driver would be sitting, and the helper was.

Q What did you do after that?

A I approached the driver who was starting to bring down the roll-top doors, identified myself, and asked him what was in this truck. He said, he didn't know. I asked him about the case of brandy on the front seat. I asked him if that was his; where it came from, and he just shrugged and didn't give any answers.

Q Can you identify that individual you discussed that case of brandy with in the front seat in this courtroom at this time?

A Yes, I can.

Q Can you point him out, please?

A Sitting far chair at the table here.

MR. KELLY: Indicating Mr. Garcia.

THE COURT: All right.

Q What did you do after you had this conversation with Mr. Garcia?

A Another agent then opened the rear doors of the truck which were not locked inside, and saw it was

partially filled with Blansac Brandy.

MR. WOODFIELD: May I have this marked, please?

THE CLERK: Photograph marked for identification as Government's Exhibit 2.

(So marked.)

Q Agent Teel, I show you what has been marked as Government's Exhibit No. 2, and ask you if you can identify that?

A This is a view through the rear doors of what was the same truck, showing numerous cases of brandy stacked all the way to the rear, Blansac Brandy.

Q At that time, or shortly thereafter, was there any communication between your fellow agent at the surveillance and your headquarters?

MR. ORTIZ: Your Honor, I request that these photographs being introduced at this time -- will they be introduced into evidence?

THE COURT: They haven't been.

MR. ORTIZ: I have one question with respect to the photographs, and before going onto something else, we would like to see the photograph.

THE COURT: On cross-examination, you might be able to ask for them.

MR. ORTIZ: I would like to see them at this time, your Honor.

THE COURT: No, you may not.

BY MR. WOODFIELD:

Q You can answer the question. That is, was there any conversation between your fellow agent and anyone in your main office approximately at this time?

A Another one of the agents contacted our New York Office and furnished several of the numbers that appear on these cases that were in the rear of the truck to the desk where they had a list of the numbers that appeared on the cases which were stolen. At which time, of the five or six numbers -- I'm not sure how many that were called into our desk, all of them appeared to be numbers that were in the stolen shipment.

Q Now, thereafter, Agent Teel, was the truck seized and the defendant Garcia arrested?

A We requested and obtained oral authorization to arrest Mr. Garcia, and did so subsequent to that telephone call which was just a matter of minutes after we identified the cartons.

Q And was Nicholas Lopez present at that time?

THE COURT: I'm sorry, Mr. Kelly.

MR. KELLY: That's all right, sir.

BY MR. KELLY:

Q Now, directing your attention to when you were on the sidewalk surveillance and the cab of this truck, I think you said that at a point where you were 15 to 10 feet away, you saw a case of brandy on the driver's seat of the tractor; is that right?

A I saw it on the front seat, approximately in the center of the seat.

Q And did you see any marking on that, on that box at that time other than the fact that it was some Blansac Brandy?

A I could see that it was Blansac Brandy.

Q You didn't see any serial numbers or anything like that other than the brandy name?

A No, I didn't.

Q Then you approached the defendant, had this conversation with him; is that right?

A Yes, sir.

Q And how many agents were with you at that time?

A I would have to guess, maybe six.

Q

Q Did you observe any loading or unloading of this truck?

A No. We were not able because there was no way to look in the warehouse.

Q And did you observe the truck when it entered the warehouse?

A Yes.

Q And you say that was sometime around 4:00 o'clock?

A Entered approximately 4:00 o'clock and left approximately 5:02.

Q And at the time that you saw it enter you didn't what it contained?

A No. The doors were closed. You couldn't tell whether it was full or empty.

Q At the time you seized the brandy from this truck in front of the warehouse, you didn't have a search warrant or warrant of arrest?

A No, we did not.

Q You, at that time, were surveilling that area for the first time on that day; is that correct?

A I was, for the first time, but agents had been there since the morning of the 20th.

Q You, yourself?

MR. WOODFIELD: May I be heard?

THE COURT: Can we get those agents here Monday?

MR. WOODFIELD: If I may be heard. With regard to the first portion, the reliability of the informant, the Government is not making no representation that this informant is reliable. Based on the evidence that has been adduced at this trial, it is the Government's position that there is enough evidence to have stopped Mr. Garcia and asked the question, and then arrest him, and seize the truck regardless of the reliability of this informant.

THE COURT: It is Mr. Kelly's point, as I understand it, as I have tried to read what he is saying, is that if your informant was reliable, you knew your information was reliable, one plus two, and you saw, or you had one or more agents who saw someone such as Mr. Garcia, or one who looked very much like Mr. Garcia take off with a cargo earlier in the morning, and followed it on a very circuitous route, that it would have given you enough at that point in time to go to the Magistrate and get a search warrant, and you should have done so.

Is that your point?

MR. KELLY: Yes, Judge. I would say, that

On the second question, I think you are on shakier ground, Mr. Kelly. There, again, it might depend on what information you received from the informant, but if he did have sufficient information to go get the search warrant, if the informant's information was reliable, and they didn't have too much of a positive identification on the morning trucker, there mightn't be sufficien. probable cause to have detained and searched the immediate area without a warrant pursuant to the arrest, but I don't know if I can make that determination with regard to the facts.

MR. WOODFIELD: Your Honor, the Government, at this point, will not vouch for the reliability of the informant, and doesn't feel that any evidence or testimony on that line has to be produced.

Now, with regard to the first truck, that left in the morning, the testimony was from Mr. Teel.

THE COURT: It is hearsay.

MR. WOODFIELD: Which is introducable, which is proper evidence at a suppression hearing.

THE COURT:

THE COURT: All right. You ordered two more witnesses, Mr. Kelly.

MR. KELLY: Yes, Judge.

MR. WOODFIELD: Your Honor, at this time the Government calls Fred McMahon.

F R E D E R I C K F . M C M A H O N , having first been duly sworn by the Clerk of this Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WOODFIELD:

Q By whomare you employed?

A Federal Bureau of Investigation.

Q How long have you been so employed?

A Twenty-eight years.

Q Are you a Special Agent?

A Yes, sir.

Q Where is yor present assignment?

A Newark, New Jersey.

Q Newark?

A Yes.

Q Now, Agenc McMahon, I want to direct your attention to March 19, 1974. On that day, did you have occasion to receive information from a confidential informant?

A I did, sir.

Q Was that pursuant to a telephone call?

A Yes, sir.

Q Now, is that an informant that you had previously worked with prior to that occasion?

A Yes.

Q For how many years had you received information from that informant?

A Approximately seven years.

Q That is sometime in 1967 when the relationship started?

A Yes, sir.

Q During that seven year period, did information supplied to you by that informant lead to various arrests?

A Yes, sir.

Q And did it also lead to convictions?

A Yes, sir.

Q On more than one occasion?

A Yes, sir.

Q Now, could you repeat to us what the substnace of the conversation was that you had with this informant on March 19, 1974?

A He called me and informed me that information had come to his attention that some stolen vodka was stored in New York City and he could not provide me with the location

However, he was able to provide me with a telephone number of where it was stored.

Q And do you recall if that number was 388-5550?

A Yes, sir.

Q And did you thereafter relate that information to the New York office of the Federal Bureau of Investigation?

A Yes. It was relayed, yes.

MR. WOODFIELD: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. KELLY:

Q Agent McMahon, you say that the informant advised you that the telephone number of where the stolen merchandise was situated was 388-5550; is that right?

A Yes, sir.

Q Did you, yourself, determine what the corresponding name was to that telephone number, of the owner's premises?

A No, sir.

Q And with respect to that informant, did he indicate to you how he had learned that there was stolen vodka in a place in New York?

MR. WOODFIELD: Objection to that. I don't see the relevance of this proceeding.

Q You indicated that he had been told by somebody

that it was --

MR. WOODFIELD: Excuse me. I object to it.

THE COURT: I don't know if he said it self dated or not. Is that the fact; that the informant indicated that he had been told by somebody?

THE WITNESS: That he had learned about the vodka.

Q Did he tell you the manner in which he learned of it?

A No, sir.

Q And so all you did then -- did he tell you -- Where precisely did he say he had learned the vodka was situated? In the City of New York?

A In New York City, yes, sir.

Q New York City. Then, that was the substance of your contact with this informant whereafter you transmitted this information to New York?

A Yes, sir.

MR. KELLY: I have no further questions.

CROSS-EXAMINATION

BY MR. ORTIZ:

Q You say youreceived this information on March 19th?

A Yes, sir.

Q And who did you specifically inform in New York

City at the New York office?

A I informed my case agent in Newark. In other words, it was relayed by the Agent who had the investigation in Newark.

Q You didn't call anyone in New York City?

A No. I don't believe so. No, sir.

Q Who was it that you gave the information to? Who was the case agent?

A The case agent, his name was, I believe, Kelly.

Q You believe?

A John Kelly, I believe.

Q In the New York office?

A Yes.

Q And you told him you received a telephone call from an informer who you said stated that there was some stolen vodka in New York City?

A Yes.

Q And the location was someplace which had a telephone number of 388-5550?

A Thats correct.

Q Now that's the only information he gave?

A Yes.

Q Now, can you give us the name of any case in the last seven ;years in which you received information from

this informer that resulted in a conviction?

MR. WOODFIELD: I object to that, your Honor. Again, I object to this entire line of questioning. I object to even having to introduce this.

THE COURT: I will sustain this. I don't even think this is proper. He had testified there was a number of cases which led to conviction. I don't think anything more need be said. This is not a fishing expedition to enable to find out who the informer was.

MR. ORTIZ: That is not my intention, Judge.

THE COURT: That is not your professed intention, but you are not going to get a lead to find out.

MR. ORTIZ: This is cross examination.

THE COURT: You are not going to get a lead to find out who the informer was.

MR. ORTIZ: Judge, on the question --

THE COURT: You are not going to get a lead to find out who the informer was.

MR. KELLY: We just want to find out if the informer is reliable.

THE COURT: You track down leads to find out -- you may not.

Q Can you tell us the name of any case --

THE COURT: I just sustained the objection.

MR. ORTIZ: May I complete the question, Judge. Perhaps I can ask it in a way that there will be no information that is about an informer.

THE COURT: All right.

Q Can you tell us any case in which you received information from this informer during those seven years where there was a conviction, and the name of the informer was not revealed in the procedings?

A I am not prepared to answer such a question.

Q You are not prepared to --

MR. WOODFIELD: I object to the question, your HOnor.

A You are asking for a specific case. It's not any case that I worked on.

Q I didn't hear that.

A Any particular case that would have occurred, was not a case assigned to me that I worked.

Q How do you know?

A I just relayed the information.

Q How do you know, sir, that there were cases in the last seven years, that resulted in convictions?

A Well, I was subsequently informed that what the result was. I learned of the result. Based on this information.

Q Now, how many times did that happen?

A I couldn't tell you.

Q You can't tell. And you can't tell of any particular case in which there was a conviction and the informer was not revealed in the proceedings?

THE COURT: I think he answered the question by saying that he was not immediately involved, so how could he know that the informer's name was revealed.

MR. ORTIZ: Judge, maybe we can get the answer from the witness.

THE COURT: He already gave you that answer. You are being argumentative.

MR. ORTIZ: I am trying to find out.

THE COURT: I know what you are trying to find out. He has already given you an answer to that.

MR. ORTIZ: May I put the question again?

THE COURT: No, Mr. Ortiz. Twice is enough.

Q Areyou prepared today, in any way, to give us the name of any cases which resulted in arrests or conviction by virtue of any information that you received from this informant?

A OUtside of this one?

Q Yes.

A This particular conviction?

Q Yes.

A I am not prepared to give you such information.

Q Can you tell us as best you recollect the conversation that you had with that informer on March 19, 1974?

A Other than what I have stated, no, sir. Nothing additional to that.

MR. ORTIZ: I have no further questions.

MR. WOODFIELD: I have nothing further, your Honor.

THE COURT: You may step down.

(Whereupon the witness was excused.)

MR. WOODFIELD: The Government calls Stephen Morrill.

S t e p h e n E . M o r r i l l , having first been duly sworn by the Clerk of this Court, was examined and testified as follows:

THE COURT: Mr. Morrill, is Stephen spelled with a p-h ?

THE WITNESS: P-h, yes.

MR. ORTIZ: May the record indicate that this witness was seated in the courtroom.

THE COURT: You are the case agent?

THE WITNESS: Yes, I am.

THE COURT: There was no search of the warehouse. Take the truck away, supposing Mr. Garcia walked out on the street with half a dozen, and he is walking on down the street with them, you mean to say you have a move to suppress because he brought them out and into the public view? You don't have any standing. Your premises, if they be your premises, were not searched.

MR. KELLY: Judge, I didn't look up a law on this because it's not really my problem.

THE COURT: It's his problem. I am not arguing your case. I am talking about Mr. Ortiz' case. He didn't make a motion until the hearing was under way last Thursday or Friday, and I said I would consider it, and after considering, I don't see that he has any standing, so I don't see I have any concern with him, but let's get on to you.

MR. KELLY: After hearing all that we have heard that it might very well be that the Government did not have sufficient evidence to go to a Magistrate to get a search warrant. So, I think what is clear, though, is that at the time these agents were on surveillance in front of this warehouse they had information that there was contraband, this was liquor

to any of those facts that you have stated. The facts, as I heard them, were substantially different than the way you recited them. I think I made it clear as to the basis of my claim.

MR. ORTIZ: Exception.

MR. WOODFIELD: Your Honor, there is one additional matter. To be very brief with it, the Government does intend to introduce a statement made by the defendant, Rua, and of course will advise counsel and turn the statements over to the defense counsel far in advance of trial. While there hasn't been any specific motion to suppress, I think he is entitled to determine whether or not the defendant was adequately advised of his rights at the time of the arrest, and I am able to produce that witness, which is Agent Morrill.

THE COURT: There have been no suppression statements.

MR. WOODFIELD: If there was, --

MR. ORTIZ: Not the motion to severe. That hasn't been waived.

THE COURT: You made your motion to suppress by --

MR. ORTIZ: I didn't make any motion to severe.

THE COURT: We are not talking about the motion to severe.

MR. ORTIZ: With respect to the motion to suppress the statement of my client. I am not making that statement. I thought you said you were going to introduce Mr. Garcia's statement.

MR. WOODFIELD: I thought I told you I was not going to do that.

MR. ORTIZ: You are not going to introduce Mr. Garcia's statement?

MR. WOODFIELD: No.

MR. ORTIZ: Only Mr. Rua's.

THE COURT: Send for the jury.

This indictment was filed March the9th; is that correct?

MR. WOODFIELD: Yes, Your Honor.

(Whereupon a side bar was held as follows)

THE COURT: I said to Mr. Kelly just moments ago that as part of his motion, that he moved us to suppress and did he want a separate hearing.

MR. KELLY: Judge, in viewof the fact that the Government has indicated itwill not use the statement of the defendant, Garcia, I withdraw that part of the motion that had to do with that part of the statement.

(Whereupon the side bar was concluded).

(continued next page)

A Yes, he did.

MR. WOODFIELD: I offer this in evidence at this time, your Honor.

(Handing document to Mr. Ortiz.)

MR. ORTIZ: No objection.

THE CLERK: Government's Exhibit 23 received in Evidence.

Q Agent Morrill, after Mr. Rua signed that form, did you have a conversation with him?

A Yes, I did.

Q After that conversation, was that conversation reduced to writing?

A Yes, it was.

Q And was that writing signed by Mr. Rua?

A Yes, it was.

MR. WOODFIELD: May I have this two-page exhibit marked, please?

THE CLERK: Two pages marked for Identification as Government's Exhibit 24.

Q Now, Agent Morrill, I show you what's been marked as Government's Exhibit 24 for Identification and ask you if you can identify it. (Handing to witness.)

A Yes, I can.

Q And how are you able to do so?

A Well, my signature appears on the bottom as a witness to it. The date is 6/20/75; also, Eduardo Rua's signature appears above it, and it is a two-page document in my handwriting with his statement and signature below it.

MR. WOODFIELD: Offer into evidence at this time.

(Handing to Mr. Ortiz.)

MR. ORTIZ: No objection.

THE CLERK: Government's Exhibit 24 received in Evidence.

Q Agent Morrill, with regard to Government's Exhibit 24 now received in Evidence, whose handwriting is that form in (handing to witness)?

A It's in my handwriting.

Q And how did you arrive at the information you put on that paper?

A It was the statement given to me by Eduardo Rua.

Q And you reduced it to writing?

A Yes, I did.

Q Was that in his presence?

A Yes, it was.

Q And did he sign it thereafter?

A Yes, he initialed the first page and indicated

that he read it, and then, after writing his statement that he had read the two-page document, signed it.

MR. WOODFIELD: Your Honor, I would request that Mr. Morrill now read the exhibit to the members of the jury.

THE COURT: All right.

THE WITNESS: "I, Eduardo Rua, have appeared at the New York Office of the FBI pursuant to the order of the United States Magistrate, Eastern District of New York, for fingerprinting, photographing and interview. I have been advised of my rights by Special Agent Stephen Morrill as they appear on a standard FD-395 Form.

"I have read this form, understand it and have signed the waiver indicating my willingness to be interviewed. Agent Morrill and Donald Dowd have made their identities known to me, and the reason for the interview.

"I am a high school graduate and I make the following statement voluntarily and without threat or promise from the FBI.

"I have known Hector Matteos since the early part of 1974. Matteos approached me with a proposition to use my warehouse to put a load of stolen liquor in

it. Matteos was to have paid me $1,000 per day for use of my warehouse at 187 Kent Avenue, Brooklyn, New York.

"I was not present when the stolen truck was to be taken to mywarehouse, and I never saw the merchandise. Hector Matteos met with me on a second occasion and discussed the load. On this occasion another individual was with him by the name of Bibi. Bibi told me he would get the truck and the stuff would only be in my place about one day. Matteos and Bibi were trying to convince me it would be safe. I did not actually find out the liquor was taken to my warehouse until after the FBI recovered it and arrested my warehouse manager. I did not get paid for use of my warehouse in this matter," and then it is signed in Eduardo Rua's handwriting, "I have read the above statement consisting of page 1 and 2, and it is true and correct to the best of my knowledge." It is signed, Eduardo Rua.

MR. WOODFIELD: I have no further questions.

Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ORTIZ:

8-5-76
COPY RECEIVED.
ALLEN LASHLEY
ATT'Y FOR APP. RUA

CERTIFICATE OF SERVICE

August 5, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.